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Nos. 430 and 834.

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (No. 430, R. 1223–1236, 1268–1271) is reported at 234 F. 2d 797. The opinion of the district court denying petitioner's motion to correct the sentence and granting his motion to reduce the sentence (No. 834, R. 15–16) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1956, and the petition for rehearing was denied July 31, 1956. (No. 430, R. 1223, 1268.) The petition for certiorari in No. 430 was filed on September 17, 1956 (the time for filing having been extended by Mr. Justice Minton), and was denied on November 19,

1956. On March 4, 1957, the denial was vacated and certiorari was granted, limited to the question of the legality of the sentence. (No. 430, R. 1276.) The petition for certiorari in No. 834, seeking review of the district court's order denying petitioner's motion for correction of sentence, was filed on March 13, 1957, and was granted on March 25, 1957. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was indicted, found guilty, and sentenced under Section 145 (b) of the Internal Revenue Code of 1939 for the offense of wilfully attempting to evade income taxes by filing false and fraudulent returns. The principal question is whether the sentence, though authorized by Section 145 (b), is unlawful because it was not imposed under Section 3616 (a) of the Code. A subsidiary question is raised by petitioner's contention that there is such an overlap between Sections 145 (b) and 3616 (a) as to preclude the imposition of any valid sentence whatsoever.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter

or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616 (a).)

STATEMENT

On March 9, 1953, a three-count indictment was filed against petitioner in the United States District Court for the Northern District of Illinois. Count one alleged that, "on or about the 10th day of March, 1947", petitioner "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return" understating his net income and his tax liability, "[i]n violation of Section 145 (b), Internal Revenue Code; Title 26, United

States Code." (No. 430, R. 3–4.) Counts two and three charged, in similar language, violation of the same statute with respect to income taxes for the years 1947 and 1948. (No. 430, R. 4–5.) The amounts of net income and tax liability, as reported in the returns and as corrected, were alleged to be as follows (No. 430, R. 3–5):

	Net Income		Income Tax	
	Reported	Corrected	Reported	Corrected
Count I (1946)	$11,753.96	$44,254.60	$2,780.15	$20,856.74
Count II (1947)	16,785.52	70,785.75	4,620.98	39,454.76
Count III (1948)	34,053.12	52,805.05	8,968.52	17,997.25
Totals	$62,592.60	$167,845.40	$16,369.65	$78,308.75

The first trial ended in a mistrial in 1954. (No. 430, R. 42.) On May 11, 1955, after a second trial, the jury found the petitioner guilty as charged. (No. 430, R. 1171.) A motion for judgment of acquittal or for a new trial was denied on May 27, 1955. (No. 430, R. 1210–1211.) On June 16, 1955, petitioner was sentenced to concurrent two-year prison terms on each of the three counts and was fined $2,000 on each count. (No. 430, 1212–1213.) On appeal, the Court of Appeals affirmed the conviction as to counts two and three, but reversed as to count one. *United States* v. *Achilli*, 234 F. 2d 797. (No. 430, 1223–1236.) On November 19, 1956, this Court denied certiorari.

On November 26, 1956, petitioner filed a motion in the district court to correct or reduce the sentence, relying upon Rule 35 of the Federal Rules of Criminal Procedure. (No. 834, R. 6.) On February 6, 1957, the district court denied the motion to correct sentence

but reduced the sentence on the two affirmed counts from two-year concurrent sentences and $2,000 fine on each count to one-year concurrent sentences and $1,000 fine on each count. (No. 834, R. 9–10, 14.) An appeal was taken to the Court of Appeals on March 1, 1957. On March 4, 1957, this Court vacated its prior order denying certiorari, and granted the petition in No. 430, limited to the question of the legality of the sentence. On March 25, 1957, the Court granted the petition for certiorari in No. 834, seeking review of the district court's order denying the motion for correction of sentence.

The evidence to support the verdict may be summarized briefly as follows:

The Government's proof of unreported income consisted of (1) direct evidence of petitioner's receipt of substantial amounts of unreported income, and (2) evidence of net worth increases and expenditures substantially in excess of reported income.

(1) Late in 1944 petitioner and one Gromer, a practicing lawyer, formed a partnership known as Highland Motor Sales, each investing $6,000 and obtaining an $18,000 loan. The firm acquired a franchise for the sale of Chrysler automobiles.

Fifty-three witnesses testified that they had purchased a total of 134 automobiles from Highland Motor Sales during the prosecution years. All of them had dealt either with petitioner or his sales manager. (No. 430, R. 123–465.) In each instance the sale was either omitted from the books entirely or the selling price was understated on the books. (No. 430, R. 925–944.) This unrecorded income, which

was reported on neither the partnership return nor petitioner's return (No. 430, R. 83, 91–94, 802–806), totalled the following amounts (No. 430, R. 944):

1946	$14,955.10
1947	36,131.53
1948	21,068.00

Petitioner was the active head of Highland Motor Sales and had supervision of the books and records. (No. 430, R. 796–802.)

The Government's evidence also showed that petitioner had received interest income and income from the discounting of notes, none of which was reported on the returns. (No. 430, R. 585–589, 776–781, 864–865.)

(2) The Government's computations of income on the net worth-expenditures method took into account a liability running from petitioner to his inactive partner of 50% of the unrecorded and unreported receipts from the sale of cars, in view of the possibility that petitioner might be accountable to him for such amounts. After this adjustment the net worth proof showed that petitioner had realized unreported income of $13,803.94 in 1946, $36,958.63 in 1947 and $22,623.18 in 1948. (No. 430, R. 944–946, 957–959.)

SUMMARY OF ARGUMENT

I

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony to "wilfully attempt * * * in any manner to evade or defeat" the income tax. This section prescribes the same penalties, and is phrased in substantially the same language, as each of its

seven predecessors in the revenue acts enacted between 1924 and 1938. The legislative history clearly demonstrates that Section 145 (b) was intended by Congress to be the specific, primary, and perhaps exclusive, provision punishing income tax evasion attempted in any manner, including the most flagrant and by far the most common method of evasion, the filing of a false or fraudulent return.

If the Court should find it necessary to decide whether Section 3616 (a) applies to income tax returns, the legislative history would support a conclusion that neither that statute nor its immediate predecessor, R. S. § 3179, was ever intended by Congress after 1913 to so apply, for beginning in that year every revenue act levying an income tax contained specific penal provisions applicable to violations of that particular act. The 1939 Code is not a revision but a compilation, and it was the manifest intention of Congress that it should make no change in existing law. R. S. § 3179 was reenacted as Section 3616 (a) of the Code because it had never been expressly repealed. However, that provision, by 1939, had been so thoroughly superseded by later, specific legislation that it probably applied only to three obscure kinds of taxes, not including the income tax, for which there appeared to have been no evasion or false returns provisions in the acts themselves. To argue that its re-enactment as Section 3616 (a) enlarged its preexisting scope is to contend that Congress failed in its purpose of making no change in existing law.

To the extent that there may be inconsistency or overlap between Sections 145 (b) and 3616 (a), we

believe the problem must be resolved by giving effect to the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions are to be treated as felonies, not misdemeanors. If Section 3616 (a) is so applied as to preclude the imposition of felony sanctions in an income tax evasion case where the filing of a false return is charged and proved, the result would be the virtual invalidation not only of Section 145 (b) but of its twenty-one counterparts in the 1939 Code which punish as felonies any willful attempt to defeat or evade in any manner various taxes other than the income tax. Finally, such a construction of Section 3616 (a) would, in the light of the relationship between that provision and other statutes *in pari materia,* produce absurd and incongruous results which could not have been intended by Congress.

II

If it be assumed that Section 3616 (a) applies to income tax returns, the sentence imposed on petitioner was nevertheless authorized by Section 145 (b). It has been repeatedly recognized by this Court that the filing of a false or fraudulent return in a willful attempt to evade income taxes violates Section 145 (b). In the overwhelming majority of cases the attempt takes the form of such a filing. Deletion of such conduct from the ambit of Section 145 (b) would construe the phrase proscribing attempted evasion "in any manner" to read "in any manner except filing a false or fraudulent return", a plain frustration of the Congressional design. There is nothing unusual or improper in the overlapping of criminal statutes. In-

deed, it is commonplace that a single act or transaction may violate more than one statute. Assuming that petitioner could properly have been sentenced under Section 3616 (a), there is no merit in the contention that the trial court lacked power to impose sentence under Section 145 (b). The maximum penalties there prescribed provide "a range for judicial sentences according to the circumstances and gravity of particular violations." See *United States* v. *Gilliland*, 312 U. S. 86, 95. In the final analysis, it was for the court to determine the degree of punishment, within the limits provided by Congress. The court, had it so desired, could have imposed a *de minimis* sentence or a very severe one—and its authority in either event derives from Congress.

The cases petitioner relies upon for the argument that Section 145 (b) as here applied deprives him of the equal protection of the laws are clearly distinguishable, for the statutes there involved infringed upon the discretionary sentencing power of the judiciary. A statute may be unconstitutional if it vests in the prosecuting authorities discretionary power which properly belongs to the courts, but plainly that is not this case.

The contention that the trial court was required to impose sentence under Section 3616 (a) because it is the less harsh statute is also without merit. We can find no federal case holding that punishment may be imposed only under the less harsh of two overlapping criminal statutes. The decisive question in every instance must be the intent of Con-

gress, which has here been repeatedly manifested, namely, that income tax evasions attempted in *any* manner, including the filing of false returns, should be punished as felonies. Even if one accepts petitioner's argument that only one statute may apply, there is the further answer that it is Section 145 (b) which governs. A later enacted provision controls over an earlier, for it "expresses the will of the government as to the manner in which the offences shall be subsequently treated." *United States* v. *Tynen,* 11 Wall. 88, 93; *United States* v. *Yuginovich,* 256 U. S. 450, 463.

ARGUMENT

I

SECTION 145 (b) IS THE PRIMARY, SPECIFIC, AND PERHAPS EXCLUSIVE, PENAL SANCTION PROVIDED BY CONGRESS FOR INCOME TAX EVASION ATTEMPTED "IN ANY MANNER", INCLUDING THE FILING OF A FALSE OR FRAUDULENT RETURN

Introductory

The principal question presented is whether a person indicted and convicted of evading income taxes by filing false and fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939, may receive a sentence which, though authorized by Section 145 (b), is in excess of that permitted by Section 3616 (a) of the Code.[1] The assumption on which

[1] Petitioner was originally sentenced to concurrent two-year prison terms on each of the three counts and was fined $2,000 on each count. (R. No. 430, 1212–1213.) That sentence plainly depended upon Section 145 (b) for its validity. However, on February 6, 1957, the district court reduced the sentence on the two counts affirmed by the Court of Appeals to one-year concurrent sentences and a $1,000 fine on each count. (No. 834, R.

this question is framed is that Section 3616 (a) applies to *income* tax returns. The validity of that assumption lies, however, at the very threshold of the case. If the assumption is invalid, there is no overlap in the scope of Sections 145 (b) and 3616 (a).

In the first section of this brief, the Government will present legislative materials, relating principally to the genesis and history of Section 3616 (a), and its relationship to Section 145 (b) and other specific provisions contained in the Internal Revenue Code of 1939, which clearly demonstrate that Section 145 (b) was intended by Congress to be the specific, primary, and comprehensive provision punishing income tax evasion attempted "in any manner", including the filing of a false or fraudulent return. To the extent that there may be any inconsistency or overlap in the penalties applicable to income tax evasions, we believe the problem must be resolved by giving effect to the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions, including those involving the filing of false returns, are to be treated as felonies, not misdemeanors.

Moreover, if the Court should find it necessary in this case to reach the question whether Section 3616 (a) applies to income tax returns, these materials

9-10, 14.) Petitioner argues that the reduced sentence is not valid, for the record shows that he has been sentenced for commission of a felony and not a misdemeanor and hence there is a "possibility of consequences collateral to the imposition of sentence," *Pollard* v. *United States*, 352 U. S. 354, 358, sufficiently substantial to justify review. Although the question is not free from doubt, the Government assumes, *arguendo*, that petitioner's reduced sentence is in excess of the maximum permitted by Section 3616 (a).

would support a conclusion that Section 3616 (a) is entirely inapplicable to income tax evasions; and that as to the latter, the penal sanction provided in Section 145 (b) applies to the exclusion of Section 3616 (a). In short, the Government's position is that in a case like this, involving a conviction of income tax evasion under Section 145 (b), the validity of the sentence is to be determined by reference to that statute alone, not to Section 3616 (a). It is clear, we submit, that Congress intended that every attempt to evade income taxes, whatever form such attempt might take, should be punishable as a felony under Section 145 (b). If the Court should agree with this conclusion, it need go no further in considering whether Section 3616 (a) may properly be invoked as a basis for prosecution in income tax cases. For, regardless of the validity or invalidity of Section 3616 (a) as so applied, it could not be a basis for negating the unequivocally expressed intent of Congress that the felony sanctions of Section 145 (b) are applicable to *all* income tax evasions falling within its ambit.

The use of Section 3616 (a) in income tax cases

In the instant case, Section 145 (b) was the statute cited by the grand jury in the indictment and by the trial judge in the judgment of conviction (No. 430, R. 3–5, 1212.) If regard be had solely to Section 145 (b), there could be no doubt that petitioner's indictment, conviction, and sentence were lawful in all respects, since that section in express terms makes it a felony for any person to attempt wilful evasion of his income tax liability. Petitioner was charged with

A holding that Section 3616 (a) reduces the penalties provided by Section 145 (b) to those of a misdemeanor would be equally applicable to these various specific felony provisions. It is inconceivable that Congress could have intended or anticipated so drastic a negation of the penalties provided in all these sections.

Long before Section 3179 of the Revised Statutes was re-enacted as Section 3616 of the 1939 Code, it had been so thoroughly superseded by later specific legislation that in large part it had ceased to have effect. It was incorporated into the Code, however, because it had never been expressly repealed. It had been mentioned by Congress only once in revenue legislation enacted between 1874 and 1939. That was in 1912, when it was made applicable to the excise tax on white phosphorus matches.[25] It appears that, as of January 1939, Section 3616 probably applied to only three taxes, for which there appeared to be no evasion or false returns provisions in the acts themselves: (1) the excise tax on certain fish, animal and vegetable oils (26 U. S. C. 2490–2494); (2) the tax on the average amount of circulation issued by certain banks (26 U. S. C. 1900–1907); and (3) the excise tax on certain transfers of stock or securities to avoid income tax (26 U. S. C. 1250–1253, note particularly Sec. 1253 (c)). The existence of these three areas of applicability, areas in which without Section 3616 there would apparently have been no criminal sanction available within the internal revenue laws, indicates that Con-

[25] 37 Stat. 83, 84.

that offense, and there is no question that it was amply proved by the evidence. Petitioner's attack upon the sentence is based solely upon a statute (Section 3616 (a)) cited neither in the indictment nor in the judgment of conviction which, he contends, should be construed as precluding the imposition of more than misdemeanor penalties to any case under Section 145 (b) where the facts also show the filing of a false return in violation of Section 3616 (a).

If one looks solely at the face of Section 3616 (a), it is possible to conclude that it applies to income tax returns as well as to all other federal tax returns. The language of the section (quoted *supra*, p. 3) is general and unqualified, and in terms it appears to embrace every type of federal tax return without exception. In view of the broad scope of the statutory language, the Government has in recent years (i.e., from October 1952 to March 1957)[*] proceeded on the assumption that Section 3616 (a) may properly be invoked as a basis for prosecution in income tax cases where the facts so warrant. The instant case, as well as the other cases before the Court presenting identical contentions, have brought into question the soundness of that assumption.

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[*] However, in its brief on the merits in *United States* v. *Novick*, 273 U. S. 262 (No. 395, Oct. Term, 1926), pp. 16-19, the Government contended that the immediate precursor of Section 3616 (a) (Section 3179 of the Revised Statutes of 1874) was "undoubtedly repealed * * * *pro tanto*" as to the income tax by the various specific penalty provisions contained in the subsequent income tax statutes.

gress intended the section to be effective as a residual provision covering offenses for which no other sanction was provided.

Comparison with other statutes in pari materia.

Since Congress clearly intended that Section 3616 should have exactly the same force that Section 3179 of the Revised Statutes had in December 1938, there is substantial basis for the view that it does not apply to the income tax. If it is so applied as to preclude the imposition of felony sanctions in an income tax evasion case where the filing of a false return is charged and proved, Section 3616 (a) would produce absurd and incongruous results which could not have been intended by Congress. In this connection, we refer to Sections 145 (a), 3793 (b) (1) and 3809 (a) of the Internal Revenue Code of 1939, and to Section 1001 of the Criminal Code.

Section 3616 prescribes maximum penalties of $1,000 fine and one year in prison. Section 145 (a), which proscribes mere acts of omission such as failing to file a return, pay a tax or supply information, provides maximum penalties of $10,000 fine and one year in prison. Thus, under petitioner's theory, the punishment applicable to the commission of the affirmative act of evasion (i. e., willfully filing a fraudulent return) is less severe than that applicable to mere acts of omission. But, as this Court has long recognized, the affirmative act is a graver offense against the revenue than a mere act of omission. *Spies* v. *United States*, 317 U. S. 492, 497–499.

Again, Section 3793 (b) (1) provides maximum penalties of $10,000 fine and five years' imprisonment

Section 3616 (a) is derived from a penal provision which was originally enacted in 1798, 1 Stat. 580, 586, and was reenacted in 1874 as Section 3179 of the Revised Statutes. However, so far as we can discover, there were no prosecutions for income tax violations under that section prior to October 1, 1952. On the latter date there was filed in the Southern District of Florida a three-count information against one Mary Evelyn Jones, alleging that "with intent to defeat and evade the assessment of income tax[es] against her" for the years 1947, 1948 and 1949, she "did deliver and disclose to the Collector of Internal Revenue * * * false and fraudulent income tax return[s]" in that she had claimed credit for fictitious dependents "in violation of Title 26 U. S. Code, Section 3616" (*United States* v. *Jones*, S. D. Fla., No. 636, Ocala, Criminal). In the *Jones* case, the Department of Justice had authorized the United States Attorney to proceed under Section 3616 (a) because it was reluctant to prosecute such a minor evasion of income tax (totalling $430 over the three years) as a felony under Section 145 (b).

During the four and one-half year period between October 1, 1952, when the *Jones* case was initiated, and March 1957, when the Attorney General directed that no prosecutions for income tax violations be instituted under Section 3616 (a) pending definitive adjudication of its scope by this Court, the Government invoked Section 3616 (a) in 177 cases of alleged income tax evasion,[3] confining it exclusively to taxpayers like

[3] Fifty of these 177 cases remain undisposed of. Of the 127 closed cases, 111 resulted in pleas of guilty and seven in pleas

Miss Jones who attempted to evade very small amounts of tax. In such cases the Government was reluctant to bring felony charges under Section 145

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of *nolo contendere*. Six defendants went to trial, of whom four were acquitted and two convicted. Of the 120 convicted persons, 95 were fined or given probation or suspended sentences, and 25 were sentenced to terms of imprisonment ranging between 30 days and one year. Among those 25 were the two persons who were convicted after trial, one of whom was sentenced to 60 days and the other, four months. Both sentences have been served. Of the 23 persons who were sentenced to imprisonment after pleas of guilty or *nolo contendere*, 16 have served their sentences and seven are still incarcerated. Three of the 127 closed cases were rendered moot by reason of the deaths of the defendants before sentence.

Since October 1952, the Government has invoked Section 3616 (a) as the basis for prosecution in less than 7% of the criminal income tax evasion cases involving the filing of a false return. A holding now that Section 3616 (a) does not apply to income tax returns would undoubtedly cast a cloud upon the legality of the convictions secured under that section. In this connection, it should also be pointed out that the consequences of holding, as petitioner urges, that Section 3616 (a) applies in such cases to the exclusion of Section 145 (b), would be infinitely more serious. Since the Revenue Act of 1924, Section 145 (b) has been the basis for prosecution in literally thousands of criminal income tax evasion cases. As appears *infra*, pp. 32-33, its applicability to such cases has been sustained by this Court and by the courts of appeals in a host of decisions extending over a period of three decades. A ruling now that the sentences imposed in all these cases are illegal if they exceed the limits permitted by Section 3616 (a) would create legal and practical difficulties of an obviously grave nature. We point this out, not as a reason for holding Section 145 (b) to be applicable in the instant case, but solely to meet the argument that results of a most unfortunate nature would flow from a holding that Section 3616 (a) is inapplicable to income tax offenses.

(b) since the offense was deemed to be of minor proportions, and since Section 3616 (a) appeared to be available as a basis for prosecuting the offense as a misdemeanor. The Government felt that in such cases, considering the lesser degree of gravity of the offense; it was appropriate, and more commensurate with the offense, to prosecute the defendant, not for a felony under Section 145 (b), but for a misdemeanor under Section 3616 (a). Prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F. 2d 97 (1955), there were no judicial holdings or intimations that Section 3616 (a) could not be so applied. In *Berra* v. *United States*, 221 F. 2d 590, affirmed on other grounds, 351 U. S. 131, the Eighth Circuit, following its earlier decision in the *Dillon* case, had affirmed a conviction and sentence under Section 145 (b), on the ground that Section 3616 (a) did not apply to income tax returns. Since both the Government and the petitioner in the *Berra* case agreed that Section 3616 (a) was applicable to income tax returns, this Court's opinion assumed, *arguendo*, the correctness of that interpretation of the statute. (351 U. S. at 133.) The dissenting opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, considered the case on the basis of the same assumption. (351 U. S. at 138.)

Early this year, however, the Government undertook to make a fresh, comprehensive review of the legislative history of Section 3616 (a), with a view towards reexamining the correctness of the interpretation that it applies to income tax returns. This action was taken

for several reasons: (1) the concern that, if Section 3616 (a) is properly to be construed as inapplicable to the income tax, the Department of Justice should not continue to invoke it in any income tax evasion case; (2) in deference to the views expressed by Justices Black and Douglas in the *Berra* case, namely, that if Sections 145 (b) and 3616 (a) are construed to overlap, serious constitutional questions would arise; and (3) because of the new and more serious dimensions which the problem had assumed as a result of the number of cases following *Berra* in which the issue of overlap was being raised. As a result of such review, the Government has now concluded that there is at least a serious question whether Section 3616 (a), despite the generality of its language, was intended by Congress, when it enacted the Internal Revenue Code of 1939, to apply to income tax returns.

Legislative history of Sections 3616 (a) and 145 (b)

As already stated, the oldest ancestor of Section 3616 (a) is a penal provision originally enacted in 1798 when there was no federal income tax and when the principal sources of revenue for the Federal Government were excise taxes and customs duties. In that year Congess enacted a statute making it a misdemeanor for "any person * * * [to] deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made * * *."[1] Similar provisions appeared in various later revenue acts, including the first

[1] Sec. 11, c. 70, 1 Stat. 580, 586.

act (1861) imposing an income tax.[5] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[6] and in the 1864 act to include a "list, return, account, or statement."[7] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. However, so far as we can discover, there were no prosecutions under that provision for income tax violations. But *cf. United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N. D. Ill. 1868).

In 1870, Congress repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths (oaths being required in connection with other revenue returns) under the penalties of perjury.[8] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes.[9] Since

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[5] Secs. 16, 49–51, c. 45, 12 Stat. 292, 298, 309.

[6] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432, 435.

[7] Act of June 30, 1864, as amended, Secs. 15, 116–123, c. 173, 13 Stat. 223, 227, 281. This Act added the word "assessment" to valuation and "enumeration."

[8] Secs. 6, 11, 37, c. 255, 16 Stat. 256, 257, 259, 271.

[9] Section 3179 reads as follows:

> Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

there was no income tax law in effect in 1874, Section 3179 could not at that time apply to the income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same civil penalties that had been imposed by the 1870 act—50 percent of the tax for a willful failure to file and 100 percent for the willful filing of a false or fraudulent return.[10] In omitting mention of criminal sanctions in the 1894 act, Congress presumably intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257, and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

It appears that Section 3179 continued unimpaired until the War Revenue Act of 1898 (30 Stat. 448, c. 448). Although that act levied no income tax, it is important here because it marked the resumption of a Congressional policy which (though it had not been in effect since 1874) has been followed ever since, of incorporating into each revenue act specific criminal penalties applicable to violations of that act. Incorporated in Section 23 of the 1898 Act was the provision that

> * * * if any such manufacturer or maker * * * shall make any false or untrue declaration such [person] shall be deemed guilty of a misdemeanor, and upon conviction shall pay a fine of not more than $500, or be imprisoned not more than six months, or both, at the discretion of the court.

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[10] Compare Sec. 29, c. 349, 28 Stat. 509, 554, with Sec. 11, c. 255, 16 Stat. 256, 259.

The necessary result of this specific provision was that the general, earlier provision of Section 3179 was superseded *pro tanto*. *Kepner* v. *United States*, 195 U. S. 100, 125; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Yuginovich*, 256 U. S. 450, 463.

In 1909, when Congress imposed an excise tax on corporations, measured by corporate income, it followed the same policy. It provided maximum criminal penalties of one year in prison and a $1,000 fine for willfully making a false or fraudulent return with intent to defeat or evade the assessment,[11] the same penalties contained in Section 3179. The 1909 act set the pattern for the later penal provisions relating to income tax. Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for violations thereof.

Four years later, Section II of the Revenue Act of 1913, levying an income tax, provided that (Sec. II (F), c. 16, 38 Stat. 114, 171):

> Any person * * * who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both * * *.

This section was patently inconsistent with Section 3179, which limited the fine to $1,000, and to that

[11] Sec. 38 (8), c. 6, 36 Stat. 11, 117.

extent superseded the latter provision. *United States* v. *Tynen*, 11 Wall. 88, 92–93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Ginsberg & Sons* v. *Popkin*, *supra*, p. 208. Further evidence that Congress did not intend Section 3179 to apply to the 1913 income tax is found in the fact that Sections 3167, 3172, 3173, and 3176 of the Revised Statutes were incorporated with amendments into the Act, but Section 3179 was not.[13] True, the Act provided (in Section II (L)):

> That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed . . .

but Section 3179 was not included in this definition, for it was *not* consistent with the specific provision in the Act itself. Clearly, Congress did not intend that Section 3179 should apply to violations of the 1913 Act.[12]

The Revenue Act of 1917, which provided for an income tax, after the usual prohibition against false or fraudulent returns, added the new misdemeanor of "evad(ing) or attempt(ing) to evade any tax" im-

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[12] The Revenue Act of 1916 (Sec. 18, c. 463, 39 Stat. 756, 775) provided the same penalties as that of 1913.

[13] Sec. II (I), c. 16, 38 Stat. 114, 177–179.

posed by the act.[14] The Revenue Act of 1918 enlarged this offense to proscribe an attempt to evade the tax "in any manner," and raised the maximum fine to $10,000, at the same time retaining the one-year maximum prison sentence.[15] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[16] The broadening of the definition of the crime, as reflected in the 1917 and 1918 acts, apparently indicates Congressional recognition that it is possible to evade the income tax without filing a fraudulent return (see *Spies* v. *United States*, 317 U. S. 492, 499).[17]

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[14] Sec. 1004, c. 63, 40 Stat. 300, 325.

[15] Sec. 253, c. 18, 40 Stat. 1057, 1085. During the debate in the Senate on the Revenue Act of 1918, Senator Penrose, a member of the Senate Finance Committee, which reported out the bill, stated that the Act was intended to be a "complete codification" of internal revenue laws: "* * * the existing law is now codified and reenacted with the additional increased taxes and amendments, so that the old law is, for all practical purposes, to be disregarded * * *." 57 Cong. Rec. 544.

[16] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Sec. 1017 (b), c. 234, 43 Stat. 253, 344. Revenue Act of 1926, Sec. 1114 (b), c. 27, 44 Stat. 9, 116. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791, 835. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169, 217. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680, 725. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652, 1703. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452, 513.

[17] The changes in definition of the crime made in 1917 and 1918 were discussed in the Government's brief in *United*

Before 1924, when attempted income tax evasion was made a felony, there existed the anomaly that the filing of a false return willfully understating the tax was only a misdemeanor, but if the return was sworn to (as it was usually required to be) the false swearing constituted perjury which could be punished as a felony under the Criminal Code. *United States* v. *Noveck*, 273 U. S. 202, 206; *Levin* v. *United States*, 5 F. 2d 598 (C. A. 9), certiorari denied, 269 U. S. 562; *United States* v. *Smith*, 27 Fed. Cas. No. 16,341, D. Ore. (1870) at p. 1184. This may have been one of the factors which motivated Congress in drastically increasing the punishment for attempted income tax evasion in the Revenue Act of 1924, making it a felony. The House bill had made no changes in the penalties, treating tax evasion as a misdemeanor, as previous legislation had always done.[18] The Senate bill, however, made any

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States v. *Noveck*, 273 U. S. 202, No. 395, Oct. Term, 1926. It was said there (pp. 17–18):

> This general [1917] provision made the first notable departure from the form of Section 3179 of the Revised Statutes in that, after prohibiting the making of "any false or fraudulent return" (the same language of Section 3179) it also punished "whoever evades or attempts to evade any tax" imposed by the Act. This modification of the Revenue Act of 1918 (c. 18, 40 Stat. 1057), both in Section 253 (p. 1085), relating to income taxes, and in Section 1308 (b) (p. 1143), relating generally to other taxes, adopted and further enlarged to include an attempt at the evasion of the tax "in any manner." This enlargement eliminated the necessity of the specific provision against filing "any false and fraudulent return," which was accordingly dropped.

[18] H. Rep. No. 179, 68th Cong., 1st Sess., pp. 71–72 (1939–1 Cum. Bull. (Part 2) 265).

willful attempt to evade any kind of tax a felony punishable by a fine of not over $10,000, or imprisonment for not over five years, or both, and incorporated other important changes. (S. Rep. No. 398, 68th Cong., 1st Sess., p. 45 (1939–1 Cum. Bull. (Part 2) 297). In conference, the new and more severe penalties provided in the Senate bill were adopted. (H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939–1 Cum. Bull. (Part 2) 313).

The felony penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[19] and were incorporated into the Internal Revenue Code of 1939 as Section 145 (b). These re-enactments of the felony provision admit of no doubt that Congress intended that any attempt to evade the income tax in any manner should be so punished.

The legislative history of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 sheds virtually no light on the problem, except insofar as they all re-enacted the felony provision and omitted the misdemeanor.

We come now to the crux of this phase of the case, the enactment of Section 3616 (a) as part of the Internal Revenue Code of 1939. Section 4 of the enacting clause provides that "The Internal Revenue Title, as hereinafter set forth, is intended to include all general laws of the United States and parts of such laws, relating exclusively to internal revenue, in force on the 2d day of January 1939 * * *."

The Code was the result of ten years work by the staff of the Joint Committee on Internal

[19] For citations see fn. 16, *supra*.

Revenue Taxation (established in 1926, see 44 Stat. 127) in cooperation with the Treasury Department and the Department of Justice. The staff was instructed to codify all the internal revenue laws except those which had been expressly repealed.[20] Great care was taken to prevent any change in existing law, the Code being intended as a compilation and not as a revision. The Senate Committee on Finance and the House Committee on Ways and Means reported that the bill made "no changes in existing law."[21] In introducing the bill in the House, Chairman Doughton of the Joint Committee on Internal Revenue Taxation stated (84 Cong. Rec. 646):

> * * * It does not change existing law in any particular. It brings into consolidated form, into one compact volume, about 150 separate acts of Congress, beginning with the Revised Statutes, enacted in 1874. There are so many laws contained in so many volumes of the Statutes at Large that it is very confusing and it is difficult even for lawyers to determine what the law actually is, and the ordinary taxpayer cannot do it at all.
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> This bill makes no change whatever in existing law, but consolidates and codifies the existing law, and brings it all into one volume so that it is immediately and conveniently available.

From the language of the enacting clause, the committee reports and the debates, it is apparent that Congress not only intended to make no change in the

[20] Hearing before the Senate Committee on Finance, 76th Cong., 1st Sess., Jan. 30, 1939, p. 1; 84 Cong. Rec. 781.

[21] Sen. Rep. No. 20, 76th Cong., 1st Sess., p. 1; H. Rep. No. 6, 76th Cong., 1st Sess., p. 3.

law but had done everything reasonably possible to guard against any such occurrence. Indeed, most of the debate on the floor of the House[22] consisted of fears expressed by individual members that some unintended change or omission might in fact be made, and of the allaying of those fears by the sponsors of the Code.[23]

It is apparent, therefore, that it was the intention of Congress that Section 3616 of the 1939 Code should have exactly the same meaning that its predecessor, Section 3179 of the Revised Statutes, had at the time the Code was enacted. And, we submit, there is ample basis for the conclusion that Section 3179 did not apply to the income tax at that critical date.

Between 1874 and 1938, an elaborate system of specific sanctions had been built up in the internal revenue laws, punishing any kind of crime against the revenue. In the income tax field, the provision, first appearing in the 1924 Act, that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony" was the "capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and

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[22] 84 Cong. Rec. 780-789.

[23] A member of the House Ways and Means Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistences into some form," the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever, * * *." (84 Cong. Rec. 646, 647.)

to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States*, 317 U. S. 492, 497. Identically, or almost identically, worded provisions constituted the "capstone" of the systems of sanctions enacted with respect to many other kinds of taxes. Thus, the 1939 Code is replete with counterparts of Section 145 (b), making it a felony to attempt to evade or defeat the admissions and dues tax (Section 1718 (b)); the estate tax (Section 894 (b) (2) (c)); the gift tax (Section 1024 (b)); the narcotics tax (Section 2557 (b) (3)); the firearms tax (Section 2707 (c)); the documents tax (Section 1821 (a) (2)); the tobacco tax (Section 2156 (b)) and fourteen other kinds of taxes.[24]

[24] The sections and chapters are as follows: Chapter 2, Subchapter A, Section 508 incorporates by reference Section 145 (b); Subchapter C, Section 651 incorporates by reference the penalties in Title I of the Revenue Act of 1934 (Section 145 (b) of the 1934 Act, 48 Stat. 725, is identical with that section in the 1939 Code); Subchapter D, Section 702 (a) incorporates by reference Section 145 (b); Chapter 6 (repealed Nov. 8, 1945), Section 1207 incorporated by reference Section 2707 (c); Chapter 9, Section 1610 incorporates by reference Section 2707 (c); Sections 1536, 1430, and 1627 incorporates by reference both Sections 2707 (c) and 1821 (a) (2); Chapter 12, Section 1856 incorporates by reference Section 1718 (b); Chapter 19, Section 2408 incorporates by reference Section 2707 (c); Chapter 20, Section 2454 incorporates by reference Section 2707 (c); Chapter 21, Section 2479 incorporates by reference Section 2707 (c); Chapter 27A, Section 3287 incorporates by reference Section 2707 (c); Chapter 29, Section 3449 incorporates by reference Section 2707 (c); Chapter 30, Section 3473 incorporates by reference Section 1718 (b); Chapter 31, Section 3483 incorporates by reference Section 1821 (a) (2); Chapter 32, Section 3496 incorporates by reference the penalty provisions applicable to taxes imposed under Subchapter A of Chapter 29, i. e., Section 2707 (c); Chapter 33, Section 3524 (expired May 21, 1943) incorporated by reference the penalty provisions applicable to taxes imposed under Subchapter A of Chapter 29, i. e., Section 2707 (c).

for "Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation * * * of a false or fraudulent return * * *." The acceptance of petitioner's argument would mean that a person assisting or counselling him in the preparation of his false returns would be punishable as for a felony, while petitioner, who perpetrated the attempted evasion by filing the return, and who stood to profit handsomely in the event the attempt went undetected, could be punished only as for a misdemeanor.

Section 3809 (a) punishes by maxima of $2,000 fine and five years imprisonment "Any person who willfully makes and subscribes any return * * * which he does not believe to be true and correct as to every material matter * * *." Thus, under petitioner's theory, he committed felonies when he made and subscribed the false returns but only misdemeanors when he filed them in a willful attempt to evade his taxes. Cf. *United States* v. *Novcek*, 273 U. S. 202, 206–207; *Taylor* v. *United States*, 179 F. 2d 640, 643, (C. A. 9).

The final anomaly is reached when Section 3616 is compared with Section 1001 of the Criminal Code (18 U. S. C. 1001). The latter statute provides that any person who "in any matter within the jurisdiction of any department or agency of the United States * * * makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." It has been

held that this offense, being but an "incidental step in the consummation of the completed offense of attempted defeat or evasion of tax by means of a false and fraudulent return", is an offense included within the crime charged by the standard Section 145 (b) indictment form used in the instant case.[28] *Gaunt* v. *United States*, 184 F. 2d 284, 289–290 (C. A. 1), certiorari denied, 340 U. S. 917; cf. *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C. A. 1). If petitioner's argument be adopted, it would mean that for the greater offense the punishment would be limited to $1,000 and one year but for the lesser included offense the punishment could be as much as $10,000 and five years. See *Ex parte Berkoff*, 65 F. Supp. 976, 981 (D. Minn.); cf. *Cohen* v. *United States*, 201 F. 2d 386, 393 (C. A. 9).

We submit, therefore, that the sanctions permitted by Section 145 (b) are wholly consistent with those prescribed by other statutes *in pari materia*, and that

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[28] The determination of whether one offense is included in another rests upon a comparison of the elements of the two crimes. *Berra* v. *United States*, 351 U. S. 131, 133-134; cf. *Stevenson* v. *United States*, 162 U. S. 313. Here the allegation that petitioner filed a false and fraudulent return with the Collector of Internal Revenue (obviously a matter "within the jurisdiction of [a] department or agency of the United States") charges a violation of Section 1001. The aggravating ingredient present in Section 145 (b) but lacking in Section 1001, is the willful attempt to evade the tax.

The sentence in the instant case, even if it were not sustainable under Section 145 (b), would be sustainable under Section 1001 except for the fact that the general three-year statute of limitations had barred prosecution under the latter provision before the indictment was returned. Cf. *Williams* v. *United States*, 168 U. S. 382, 389.

all the materials summarized above show that Congress intended cases like the one at bar to be governed by Section 145 (b) without reference to Section 3616.

II

ASSUMING SECTION 3616 (a) TO BE APPLICABLE TO INCOME TAX RETURNS, THE SENTENCE IMPOSED ON PETITIONER WAS AUTHORIZED BY SECTION 145 (b). OVERLAP OF THE TWO PROVISIONS WOULD NOT REQUIRE NEGATION OF THE SPECIFIC FELONY PENALTIES PROVIDED BY SECTION 145 (b) IN A CASE EMBRACED WITHIN ITS TERMS, EVEN THOUGH THE ACTS CHARGED AND PROVED WOULD ALSO VIOLATE SECTION 3616 (a)

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, "in addition to other penalties provided by law," to attempt wilfully "in any manner to evade or defeat" the *income* tax. In the overwhelming majority of cases prosecuted under Section 145 (b), the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145 (b) has been uniformly and repeatedly recognized by this Court (*United States* v. *Beacon Brass Co.*, 344 U. S. 43, 46; *United States* v. *Troy*, 293 U. S. 58; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 159), and by the courts of appeals (e. g., *Cage* v. *United States*, 159 F. 2d 464, 466 (C. A. 8); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1); *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A.

3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 461 F. 2d 897, 898–899 (C. A. D. C.)).

The filing of a false or fraudulent return with intent to evade any tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616 (a) of the 1939 Code. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145 (b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616 (a), assuming that the latter section is construed to apply to income tax returns.

On the basis of the assumed overlap between Sections 145 (b) and 3616 (a), petitioner argues that wherever, as here, the method of evasion charged in the indictment is the filing of a false return, Section 3616 (a), in effect, supersedes Section 145 (b), and no punishment can be imposed in excess of that authorized by the former provision. Petitioner's argument, if accepted, would in effect repeal Section 145 (b) as applied to filing false returns with intent to evade the income tax. Under his view, the phrase in Section 145 (b) proscribing attempted evasion "*in any manner*" would be construed as if it read "*in any manner except filing a false or fraudulent return*". The result would be to delete from Section 145 (b) "the most common and also the most flagrant method of willfully attempting to defeat or evade an income

tax" (*Rick* v. *United States*, 161 F. 2d 897, 898 (C. A. D. C.))—a plain frustration of the Congressional design. It would also require the overruling of *Beacon Brass* and countless other cases decided by this Court and the lower courts (*supra*, pp. 32–33) holding that the willful filing of a false or fraudulent income tax return, *without more*, is a felony punishable as such under Section 145 (b).

There is nothing unusual or improper in the overlapping of criminal statutes. Not infrequently, the areas of conduct proscribed by federal penal statutes are overlapping, not contiguous territories.[27] The criminal statutes of the United States are not like a jigsaw puzzle in which the pieces all neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one statute. *Pereira* v. *United States*, 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *Blockburger* v. *United*

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[27] The existence of a broad area of overlap between an old sanction and a new one is not unusual in the criminal law:

> Each new definition or drawing of lines around a thing thus newly made indictable is as likely to embrace within it some acts which were indictable before, by reason of lying within different lines, as to include what was not before indictable. The new and the old stand together, and a particular element of wrong may thus be found to be within any number of the law's enclosing circles. What is thus said applies, as already mentioned to the common law as well as to the statutes. The common law would be the perfection of folly, instead of meriting the praise bestowed upon it as the perfection of wisdom, if it attempted to divide the indictable into such classes that no transaction would fall into more than a single class.

(1 Bishop, *Criminal Law*, (1923 ed.) p. 558.

States, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gaviores* v. *United States*, 220 U. S. 338, 342; *Wood* v. *United States*, 16 Pet. 342, 363.[28]

Moreover, petitioner labors under the misapprehension that the trial judge's authority to impose sentence in this case derived from the fact that the indictment cited Section 145 (b) as the statute alleged to have been violated.[29] The authority of a federal judge to impose sentence in a criminal case derives from Congress, and not from any "election" by the prosecutor. Unless Section 145 (b) is deemed to be repealed by implication by Section 3616 (a) or to be otherwise inapplicable, it empowered the trial judge to impose the sentence he did in this case upon petitioner's conviction for willfully attempting to evade the income tax. If an indictment is valid in charging an offense under Section 145 (b), and if

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[28] As another example, an attempt to bribe a juror may be punishable as a felony under 18 U. S. C. 206, as a misdemeanor under 18 U. S. C. 1504, or possibly as a criminal contempt under 18 U. S. C. 401. Cf. *Slade* v. *United States*, 85 F. 2d 786 (C. A. 10); *United States* v. *Zullo*, 151 F. 2d 560 (C. A. 3); *Hawkins* v. *United States*, 190 F. 2d 782 (C. A. 4).

[29] Rule 7 (c) of the Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

the proof supports the defendant's conviction under that section, the trial judge can in his discretion impose any sentence that is lawful under that section, even though the proof may also show violation of another statute fixing a lesser penalty.

The overwhelming majority of criminal prosecutions relating to the income tax, as has already been noted (*supra*, pp. 14–15, fn. 8), have been conducted under Section 145 (b), the specific, comprehensive statute punishing attempts to defeat or evade the income tax "in any manner". The indictment in the instant case (which follows the standard form used for many years) alleges that on a certain date the defendant "did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing * * * by filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return * * *". (No. 430, R. 3–5.)

This indictment would have been valid as charging an offense under Section 145 (b) even if it had made no reference to the filing of false returns. Evasion can be attempted in various ways, and the filing of a false return is not an essential ingredient of the offense. *Spies* v. *United States*, *supra*, pp. 499–500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. An indictment is sufficient if it charges a crime in the language of the statute, *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C. A. 1), leaving further details of the charge to be furnished in a bill of particulars. Hence, omission of

an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of the indictment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7).

The significance of the allegation as to false returns is that it alleges one of the manners of evasion, thereby reducing or perhaps eliminating entirely the need for a bill of particulars. It is too much to say that its effect is also to reduce a felony to a misdemeanor, when any other allegation as to the manner of evasion would not have done so.

Moreover, petitioner's argument with respect to the indictment (Br. 8) is nothing more than a belated attack on its form, an attack which is required by Rule 12 (b), Federal Rules of Criminal Procedure, to be made before trial.[30] Had the appropriate pre-trial motion been made, the Government might have been able to cure any defect by seeking a superseding indictment.[31] By not making such a motion at the proper time, petitioner waived the right to attack the

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[30] Petitioner did file a pre-trial motion to dismiss the indictment. However, the Code provision there relied upon was not Section 3616 (a) but Section 3761 (a), relating to the compromise of civil tax liability. (No. 430, R. 7.)

[31] A new indictment could either have omitted mention of the means of evasion or have alleged that the attempted evasion was committed by maintaining and furnishing to the Treasury agents false books and records. The evidence showed that this was one of the devices petitioner employed. (R. 796 802, 910–913, 925–944).

indictment later. *Torres Martinez* v. *United States*, 220 F. 2d 740, 743 (C. A. 1).

Assuming, *arguendo*, that there is no such waiver in this case, we believe that there is no merit to the contention that the court lacked power to decide under which of the two statutes to impose sentence. Petitioner (Br. 9, fn. 7) points out that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304; *American Tobacco Co.* v. *United States* 328 U. S. 781; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Morgan* v. *Devine*, 237 U. S. 632, 639–640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Burton* v. *United States*, 202 U. S. 344, 377. He quotes (Br. 7) the opinion in *Berra* v. *United States*, 351 U. S. 131, 134:

> For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner "willfully" attempted to evade taxes by filing a false return (§ 145 (b)) were identical with those required to prove that he delivered a false return with "intent" to evade taxes (§ 3616 (a)). In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground.

Petitioner (Br. 8–9) then argues that because only one offense was committed *here*, the two *statutes* are repugnant to each other and Section 145 (b) must fall. In other words, he urges that since he could not have been punished separately under both provisions, the Government lacked the power to prosecute for a felony. However, it does not follow that merely

because prosecution could have been had for a misdemeanor the Government lacked power to proceed as for a felony, thus providing the trial court with broad discretion in imposing sentence.[32] Indeed, the assumption that petitioner could not be punished under both statutes, far from supporting his argument that Section 145 (b) must be nullified, provides all the more reason why the two statutes may co-exist. *Freeman* v. *United States,* 146 F. 2d 978, 979 (C. A. 6); Cf. *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 264. We rely mainly upon *United States* v. *Gilliland,* 312 U. S. 86; *United States* v. *Beacon Brass Co.,* 344 U. S. 43; and *United States* v. *Moran,* 236 F. 2d 361 (C. A. 2), certiorari denied, 352 U. S. 909.

In *United States* v. *Gilliland,* 312 U. S. 86, this Court reversed the dismissal of indictments alleging

[32] An examination of the two statutes, without regard to the facts of this particular case, makes it clear that there is a real difference in the proof required to make out their violation. Section 145 (b) applies only to *income tax* violations, while Section 3616 (a) applies to *all* taxes. Section 145 (b) proscribes evasion in any manner, while Section 3616 (a) requires the filing or "disclos[ure]" to the collector of a "false or fraudulent list, return, account, or statement." Obviously, it is quite possible to violate Section 145 (b) without violating Section 3616 (a) (*Spies* v. *United States*, 317 U. S. 492, 500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887) and to violate Section 3616 (a) without violating Section 145 (b) (*United States* v. *Rumsey*, 27 Fed. Cas. No. 16,207 (D. N. J., 1867); *United States* v. *McGinnis*, 26 Fed. Cas. No. 15,678 (D. N. J., 1866)). Although the overlap covers a broad area, the offenses defined in the two provisions are not identical. Section 145 (b) is both broader in scope (within the field of income tax) and in degree of culpability than is Section 3616. It follows that the two sections are not in irreconcilable conflict. Cf. *Bartlett* v. *United States*, 166 F. 2d 920, 926–927 (C. A. 10).

violations of the general "false statements" statute, then Section 35 of the Criminal Code, as amended in 1934 (now 18 U. S. C. 1001). The defendants were charged with having submitted false and fraudulent reports to a Government agency under the so-called "Hot Oil" Act of 1935, 49 Stat. 30. It was conceded that defendants' acts violated both Section 35, the felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be prosecuted only under the latter Act, since it was (*a*) more specific, dealing with the precise subject matter involved, (*b*) enacted later, and (*c*) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants stated (see 312 U. S. 88): "Otherwise, we have the same offense created and punished by two distinct enactments; and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine." The Government argued that the sanctions were merely "cumulative or auxiliary", citing *Wood* v. *United States*, 16 Pet. 342, 363, and stated "That the same act should be subject to prosecution as a felony or as a misdemeanor is one of the commonplaces of contemporary penal legislation." (No. 245, Oct. Term, 1940, Govt. Br., p. 33.) The Court held unanimously, per Hughes, C. J., that (312 U. S. 95–96):

> In the light of the text of the Act of 1934, amending § 35, and its legislative history, it is also clear that the fact that the penalty prescribed by § 35 was greater than that fixed by

the Act of February 22, 1935, *has no significance in connection with the construction and application of the former.* The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences *according to the circumstances and gravity of particular violations.*

Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal § 35 as amended in 1934, so far as the latter applied to affidavits, documents, etc., presented in relation to "hot oil." There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a *fitting complement* to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503, 504; *United States* v. *Borden Company*, 308 U. S. 188, 198, 199. [Emphasis added.]

We are unable to see a material distinction between the *Gilliland* case and the case at bar. In each case, proof of the felony charged in the indictment necessarily proved the commission of the misdemeanor, and vice versa. There, as here, the fact that the indictment charged and the proof showed violations of

both the felony and misdemeanor statutes was of no consequence. There, as here, neither statute provided a minimum sentence and the Government's invocation of the felony rather than the misdemeanor provision enlarged the area of the court's discretion in sentencing "according to the circumstances and gravity" of the case. Thus, the *Gilliland* case stands clearly for the proposition that an indictment charging a felony is valid, as such, even though the same allegations set forth a violation of a misdemeanor statute.

The principle laid down in *Gilliland,* i. e., that an offense punishable as a misdemeanor may nonetheless be prosecuted under an overlapping general felony statute, has been applied by the lower courts in *United States* v. *Aderman,* 191 F. 2d 980, 983–984 (C. A. 7);[33] *Corcoran* v. *United States,* 229 F. 2d 295, 297–298

[33] In the *Aderman* case, *supra,* it was contended that the action was wrongly prosecuted under the False Claims Act (a felony) and should have been prosecuted under the specific misdemeanor statute imposing penalties for making false statements in connection with claims arising under the Servicemen's Readjustment Act, 38 U. S. C. 715. The appellant relied upon two cases holding that transactions somewhat similar to his were properly prosecuted under the misdemeanor statute. The Seventh Circuit stated (191 F. 2d at 984):

> However, a reading of § 715 makes it clear that the penalties provided by it are not exclusive but are to be imposed "in addition to any and all other penalties imposed by law * * *." Hence the offense could properly be charged under either statute. *United States* v. *Gilliland,* 312 U. S. 86 * * *; *United States* v. *Heine,* 2 Cir., 149 F. 2d 485; *Heald* v. *United States,* 10 Cir., 175 F. 2d 878.

Note the similarity between the quoted provision in 38 U. S. C. 715 and the phrase in Section 145 (b) of the Internal Revenue Code of 1939 that its punishment shall be "in addition to other penalties provided by law * * *."

(C. A. 5); *Bartlett* v. *United States*, 166 F. 2d 920, 926–927 (C. A. 10); *United States* v. *Mamber*, 127 F. Supp. 925, 928 (D. Mass.); and *United States* v. *Ding*, 48 F. Supp. 323, 326 (D. Mass.). Cf. *Cohen* v. *United States*, 201 F. 2d 386, 392 (C. A. 9).

The second case which supports our view is *United States* v. *Beacon Brass Co.*, 342 U. S. 43. The question there was "whether by enacting a statute specifically outlawing all false statements in matters 'within the jurisdiction of agencies of the United States [18 U. S. C. 1001], Congress intended the scope of it to include the making of false statements from the scope of § 145 (b)". (344 U. S. at 46.) The Court answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. 1001, stating (344 U. S. at 45–46)[34]:

> We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. * * *
>
> We do not believe that Congress intended to require the tax-enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145 (b) should be "in addition to other penalties provided by law," Congress recognized that some methods of attempting to evade taxes would violate other statutes as well. See *Taylor* v. *United States*, 179 F. 2d 640, 644.

[34] In *Taylor* v. *United States*, twice cited with approval by this Court in the *Beacon Brass* opinion, the Ninth Circuit stated (179 F. 2d at 643–644):

> Appellant further argues that 26 U. S. C. A. § 3616 (which makes it a misdemeanor to deliver or disclose to the collector

Moreover, since no distinction is made in § 35 (A) between written and oral statements, the reasoning of the court below would be equally applicable to false tax returns which are, of course, false *written* statements. But the Courts of Appeals have uniformly applied § 145 (b) to attempts to evade taxes by filing false returns. *E. g., Gaunt* v. *United States,* 184 F. 2d 284, 288; *Taylor* v. *United States, supra,* at 643–644.

That the rule just stated applies to the precise question presented in the case at bar has recently been held by the Court of Appeals for the Second Circuit in *United States* v. *Moran,* 236 F. 2d 361, 363–364, certiorari denied, 352 U. S. 909. The appellant, like petitioner, was convicted of violating Section 145 (b) under the standard form of indictment, and contended that the trial judge had no authority to impose a sentence in excess of that prescribed by Section 3616 (a).

"any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * *.") repealed by implication § 145 (b) insofar as the latter section might be construed to prohibit the evasion of income taxes by filing false returns. The legislative history of the two sections reveals that § 3616 was originally enacted long prior to the enactment of § 145 (b). It goes without saying that an existing statute cannot repeal, by implication or otherwise, a subsequent enactment. Both of these sections were re-enacted in the 1939 general codification of the Internal Revenue Code, 53 Stat. 62, 440. We further note that the penalties provided in § 145 (b) are made expressly "in addition to other penalties provided by law."

The Court of Appeals rejected the contention, stating (236 F. 2d at 363–364):

> In this case, as in Berra, there are facts falling within an area defined by the overlapping ambits of these two sections. Nevertheless, each section requires an element of proof not required by the other. This situation is directly controlled by *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 73 S. Ct. 77, 97 L. Ed. 61, wherein it was held that where two statutes, each of which proscribe some conduct not covered by the other, overlap, a single act or transaction may violate both, at least where some different proof is required for each offense. *United States* v. *Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598; *United States* v. *Lange*, D. C. S. D. N. Y., 128 F. Supp. 797.

We submit, therefore, that, assuming petitioner has not waived the right to attack the validity of the indictment at this stage of the proceedings (*supra*, pp. 37–38), the court did not exceed its authority in sentencing petitioner under Section 145 (b). Upon conviction the trial court was free to exercise its discretion in sentencing the defendant within the limits prescribed by the statute under which the conviction was had, even though the indictment and proof might also support a conviction under another statute fixing a lesser penalty. (See *Gilliland*, 312 U. S. at 95–96.) In the final analysis, it was for the court to determine the degree of punishment, within the limits provided by Congress. There is nothing improper in allowing the

sentencing court to enjoy such a discretion. This Court has said that "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55. Recognition of this principle accounts in part for the modern trend in the direction of increasing the discretionary sentencing power of the courts. See *Williams* v. *New York*, 337 U. S. 241, 246–249. Under the aggravated circumstances present in the case at bar, not the least of which was the large amount of tax evaded (*supra*, pp. 5–6), the trial court did not abuse its discretion in sentencing petitioner under Section 145 (b).[35] It is clear that the court, had it so desired, could have imposed a *de minimis* punishment, or an extremely severe one.

For the proposition that Section 145 (b) as here applied deprives him of the equal protection of the laws, petitioner relies (Br. 10–12) upon *State of Oregon* v. *Cory*, 204 Ore. 235; *State of Oregon* v. *Pirkey* 203 Ore. 697; *In re Olsen* v. *Delmore*, 48 Wash. 2d 545; *Ex parte Garrett*, 335 Mo. 1113; and *State* v. *Fowler*, 193 N. C. 290. All of these cases are clearly distinguishable.

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[35] As we have said (*supra*, pp. 10–11, fn. 1) we treat this case as though petitioner had received a sentence in excess of that provided by Section 3616, even though the recent reduction of sentence brings it within the limits there prescribed.

since they all struck down statutes which infringed upon the court's discretionary sentencing power. If a statute has the effect of vesting in the prosecuting authorities discretionary power which properly belongs to the courts, it may be held unconstitutional on that ground. *State* v. *Pirkey,* supra, p. 706. But that is not this case. Here the court had full power, within the limits provided by Congress, to impose whatever sentence it believed was warranted by the circumstances of the case.

There is no merit in the contention (Br. 13–16) that the differences between the penal provisions of the two sections create an "irreconcilable dilemma" which can only be resolved by holding that no valid sentence whatsoever can be imposed upon petitioner. The cases he mainly relies upon here are *State* v. *Hall,* 24 Ala. App. 336; *M. M. Moran* v. *The State,* 135 Tex. Cr. R. 645; and *United States* v. *Evans,* 333 U. S. 483.

The *Hall* case involved the sustaining of an indictment found under a statute providing alternative punishments. Appellant argued that since the conduct proscribed was made both a misdemeanor and a felony, he could not know the nature of the accusation against him. The court upheld the indictment on the ground that it alleged a felony, because the maximum punishment permitted was as for a felony. The court pointed out that the alternative punishments simply afforded "a wide range varying according to the facts of each case". (24 Ala. App. at 338.)

M. M. Moran v. *The State,* 135 Tex. Cr. R. 645, turned on inconsistent penal provisions in the same act. The court confessed its inability to ascertain the intent of the legislature and dismissed the prosecution, pointing out that "We are not dealing with repugnant statutes passed at different dates where the one last enacted might control * * * ." (135 Tex. Cr. R. at 649.) The decision appears to have turned partly on peculiar provisions of the Texas Penal Code.

United States v. *Evans,* 333 U. S. 483, involving the construction of Section 8 of the Immigration Act of 1917, dealt with a problem quite unrelated to the case at bar. The statute provided that "any person * * * who shall bring into or land in the United States [or shall attempt to do so] or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place * * * any alien not duly admitted * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*" [Emphasis added.] The defendants were charged with concealing and harboring five aliens in violation of this provision. This Court upheld the district court's dismissal of the indictment, finding little assistance in the legislative history, and pointing out that the interpretation urged by the Government had been repeatedly urged on Congress without avail. The Court refused to speculate as to what the penalty clause meant in the circumstances of the case and

held that as applied to the defendants it was unenforceable.

The argument (Br. 26–27) that the trial court was required as a matter of law to impose sentence under the less harsh statute is also without merit. We can find no federal case holding that punishment may be imposed only under the less harsh of two overlapping criminal statutes.[36] The decisive question in every instance must be the intent of Congress, which has here been repeatedly manifested, namely, that income tax evasions attempted in *any* manner, including the filing of false returns, should be punished as felonies. Even if one accepts petitioner's argument that only one statute may apply, there is the further answer that it is Section 145 (b) which governs. A later enacted provision controls over an earlier, for it "expresses the will of the government as to the manner in which the offences shall be subsequently treated." *United States* v. *Tynen*, 11 Wall. 88, 93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; Cf. *United States* v. *Barnes*, 222

[36] The cases cited by petitioner, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Bell* v. *United States*, 349 U. S. 81; and *Prince* v. *United States*, 352 U. S. 322, involved questions relating to the measurement of the unit of punishment, i. e., whether Congress had condemned a particular course of conduct as constituting one offense or multiple offenses. In *Rosenberg* v. *United States*, 346 U. S. 273, the dissenting opinions expressed serious doubts as the legality of the trial court's imposition of a death sentence without the recommendation of the jury, as permitted by the Espionage Act of 1917, when Congress had provided in the Atomic Energy Act of 1946 (which also might have been held applicable to some of the overt acts of conspiracy proved) that no death sentence could be imposed without the concurrence of court and jury. In that case conviction was had and sentence imposed under the earlier of the two statutes.

U. S. 513, 520. Here it is apparent that Section 3616 (a), originally having been enacted much earlier than Section 145 (b), must yield if they are deemed to be in conflict. *Taylor* v. *United States,* 179 F. 2d 640, 643–644 (C. A. 9); Cf. *United States* v. *Sischo,* 262 U. S. 165, 168–169; *Adkins* v. *Arnold,* 235 U. S. 417, 421; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187, 199; *Grunberg* v. *United States,* 145 Fed. 81, 85 (C. A. 1).

Petitioner's argument would ignore the legislative history of the sections in question, which shows clearly (*supra,* pp. 17–29) that Section 145 (b) reflects the grave view taken consistently by Congress since 1924 that the crime of income tax evasion in any manner shall be a felony, whereas Section 3616 (a) represents the earlier view that it should be treated as a misdemeanor. Petitioner would also ignore the historic basis for the differences in the definitions of the crime. The legislative history (*supra,* pp. 21–22 and fn. 17) shows conclusively that those differences arose in the evolution of the proscription which, particularly in the Revenue Acts of 1917 and 1918, broadened the definition to cover attempts to evade the tax in any manner, thus removing the former limitation that to be punishable the attempt had to be grounded on the filing of a false document. We submit that, even on the assumption that Sections 145 (b) and 3616 (a) cannot both be applied to income tax violations and that only one can survive, Congress has made it abundantly plain that Section 145 (b) is dominant and that the penalties therein provided should not be rendered nugatory.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

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